

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NORTH PACIFIC CRANE COMPANY,)	
LLC, a Washington limited liability)	No. 62326-5-I
company,)	
)	DIVISION ONE
Appellant,)	
)	
v.)	
)	
SCOTT L. BEAR and CATHY BEAR,)	UNPUBLISHED
husband and wife and the marital)	
community composed thereof,)	FILED: <u>July 6, 2009</u>
)	
Respondents.)	
)	
)	

Cox, J. — North Pacific Crane Company (NPCC) sued its former employee and design engineer, Scott Bear and his wife, alleging breach of contract, conversion, misappropriation of trade secrets, and breach of the duty of loyalty. The trial court properly dismissed the breach of contract and conversion claims on the basis that they were settled by the parties, and the settlement agreement is not barred by Civil Rule for Superior Court 2A. NPCC failed in its burden to show that Bear violated the provisions of Washington's trade secrets act. Accordingly, the dismissal of that claim was also proper. Finally, there is also no showing of abuse of discretion by the trial court in granting Bear's motion

to compel. We affirm.

NPCC is a Washington company in the business of designing, engineering, and selling cranes for the marine industry. In April 2005, NPCC hired Scott Bear as its crane engineer and designer. NPCC and Bear signed a Contract Agreement, which set forth the terms of Bear's employment. The agreement contains confidentiality and non-compete provisions.

At the time NPCC hired him, Bear negotiated a 32-hour work week and the ability to work from home for some of those hours. The agreement provided that after nine months he could work from home more often. NPCC and Bear agreed that after he had worked for the company for 12 months they would discuss his flexible schedule further.

One of NPCC's most significant assets is its comprehensive library of engineering drawings and spreadsheets, containing many years of engineering specifications, manufacturing, and pricing for crane parts and materials. Some of this information is stored electronically and some is only in printed form. Since acquiring this library in 2005, NPCC has added to it the work of its own designers and engineers. The entire library of materials is proprietary. As such, NPCC labels its printed materials as "proprietary and confidential" and stores its electronic versions of confidential information on secure computers that have limited access. Bear, as an employee of NPCC, had access to its entire library.

In June 2006, NPCC required Bear to sign a separate non-disclosure and non-compete agreement. About that time, Bear also discussed with NPCC Vice

President Joseph James his desire to work from home more than one day a week. James did not approve more days at home. Instead, he agreed to decrease Bear's in-office work to 30 hours per week.

In early August 2007, James noticed that Bear had placed several confidential drawings of crane parts and Excel spreadsheets containing engineering information in his lunch box. James believed there was no legitimate reason for Bear to hide the drawings in his lunch box. James also discovered a printout of lists of computer files in Bear's office with several file names penciled out.

James hired an information specialist who concluded that Bear had deleted information from a number of NPCC computer files. James also learned that Bear had opened NPCC computer files containing information used to create crane parts in the past and had deleted or erased the contents of those files. James also discovered pages missing from notebooks containing past and current projects. In August 2007, James told Bear of these discoveries and terminated his employment.

Less than a week later, NPCC commenced this lawsuit, alleging misappropriation of trade secrets, breach of contract, conversion, and breach of the duty of loyalty.

During this litigation, former counsel for NPCC sent a letter to counsel for Bear offering to dismiss the breach of contract and conversion claims subject to Bear's agreement to honor for its entire term the "non-compete agreement" with

NPCC. The parties dispute whether these claims were settled by subsequent communications. The trial court determined that they had been settled and dismissed those claims.

The trial court also dismissed, without prejudice, the trade secrets claim. The court granted Bear's motion to compel discovery. Rather than complying with the order, NPCC elected to dismiss its breach of the duty of loyalty claim. Finally, Bear sought attorney fees and costs, which the trial court awarded.

NPCC appeals.

SETTLEMENT AGREEMENT FOR CONVERSION AND BREACH OF CONTRACT

NPCC argues the trial court erred by enforcing an alleged settlement agreement between the parties for the conversion and breach of contract claims and dismissing those claims from this action. We hold that the court properly dismissed these claims based on the settlement of the parties.

CR 2A

The first issue, based on the arguments of the parties, is whether CR 2A bars the enforcement of the alleged oral settlement agreement. We hold that it does not.

When deciding a motion to enforce a settlement agreement supported entirely by affidavits or declarations, the trial court proceeds as if considering a motion for summary judgment.¹ A party moving to enforce a settlement

¹ Brinkerhoff v. Campbell, 99 Wn. App. 692, 696, 994 P.2d 911 (2000) (citing In re Marriage of Ferree, 71 Wn. App. 35, 43, 856 P.2d 706 (1993)) compare Morris v. Maks, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993) (applying abuse of discretion in reviewing trial court's decision to enforce a written

agreement has the burden to prove there is no genuine dispute over the existence and material terms of the agreement.² “This is but a specific application of the general rule that one who would recover on a contract must prove its existence and terms.”³ If the moving party carries this burden, the nonmoving party must produce evidence to show the presence of a genuine dispute of fact.⁴ “The nonmoving party cannot rely on the oral assertions of counsel that are not made under penalty of perjury, or that have no basis in personal knowledge or the record.”⁵ The court considers the parties’ submissions in the light most favorable to the nonmoving party.⁶ If reasonable minds could reach but one conclusion, summary judgment is proper.⁷ We review de novo summary judgment determinations by the trial court.⁸

Here, Bear’s lawyers inquired whether NPCC would consider dismissing

settlement agreement).

² Id. at 696-97 (citing Ferree, 71 Wn. App. at 41).

³ Ferree, 71 Wn. App. at 41 (citing Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 944, 640 P.2d 1051 (1982)).

⁴ Ferree, 71 Wn. App. at 44 (citing Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

⁵ Id.

⁶ Brinkerhoff, 99 Wn. App. at 697 (citing Ferree, 71 Wn. App. at 44).

⁷ Id.

⁸ Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

the breach of contract and conversion claims for the sake of efficiency prior to summary judgment. About a week later, former counsel for NPCC sent a letter dated January 10, 2008 stating:

We are willing to agree to dismiss North Pacific Crane Company's claims of breach of contract and conversion subject to your agreement that the non-compete agreement shall remain in full force and effect for the entire term of the non-compete agreement. Dismissal of these claims would avoid the costs to both our clients of arguing about these matters at summary judgment.

Please let us know at your earliest convenience whether you are amenable to this partial resolution.

Very truly yours,
[signed]
[Former NPCC counsel]^[9]

The Declaration of Counsel Jean Jorgerson, an attorney for Bear, states that she participated in a telephonic LR 37 conference during which the above outstanding offer was orally accepted on behalf of Bear. The declaration also states that the only outstanding matter was the mechanism by which NPCC would dismiss its claims. Finally, the declaration also states that counsel memorialized the oral agreement to settle the two claims as well as the other matters discussed during the LR 37 conference in a letter that provides in part:

Thank you for your time and courtesies in participating in the LR 37 conference on January 16, 2008. This letter memorializes our conversation and agreements. If there are any statements that conflict with your recollections, please notify us immediately.

You agreed to consider ***your preferred procedure for dismissing the claims for breach of contract and conversion***, whether by stipulated order, amendment of the complaint, or simply dismissing the claims under CR 41. You agreed to let us know what you

⁹ Clerk's Papers at 426.

decide by next week.^[1]

On January 22, Bear's counsel again wrote NPCC's former counsel asking for a dismissal against Bear's wife as well. The letter stated in part: "As long as you are working on the methodology by which ***you are going to dismiss claims for breach of contract and conversion***, I thought it might be most efficient to raise that request now."¹¹

The evidence in the record before the court on Bear's motion also states that after the oral settlement of the two claims, NPCC retained new counsel. On February 4, Bear's counsel wrote to that new counsel giving him an overview of the case to date. The letter also inquired on the status of the dismissal of the claims: "What is the status of the ***dismissal of the breach of contract and conversion claims that has previously been agreed upon?***"

On February 6, NPCC's new counsel responded by letter, stating he was reviewing whether to maintain the claims. This appears to be the first notice that NPCC was not willing to abide by the oral agreement at the LR 37 conference.

Bear then moved for an order to enforce the partial settlement agreement. Although his first motion was unsuccessful, Bear moved to enforce a second time, supporting the motion with declarations of his attorneys and copies of the letters between counsel that we described above.

¹ Clerk's Papers at 427 (emphasis added).

¹¹ (Emphasis added.)

As we have stated previously in this opinion, a party moving to enforce a settlement agreement must make out a case showing the existence and terms of the agreement. Bear has made the necessary showing. Thus, the burden shifted to NPCC to provide admissible evidence to dispute that submitted by Bear. An examination of the record shows that NPCC failed to submit any admissible evidence to refute Bear's evidence that an oral agreement to settle was reached and setting out the terms of that settlement. Thus, there are no genuine issues of material fact that require a trial.

Given that this record shows that there are no genuine issues of material fact, the only question is whether Bear is entitled to judgment as a matter of law. We conclude that he is entitled to such a judgment.

Enforcement of a settlement agreement is governed by CR 2A:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, ***the purport of which is disputed***, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.^[12]

By its plain terms, CR 2A applies only to settlement agreements made by parties or attorneys "in respect to the proceedings in a cause" and to those where "the purport" of the agreement is in dispute.¹³

In re Marriage of Ferree,¹⁴ addressed whether a settlement that was not in

¹² (Emphasis added.)

¹³ Ferree, 71 Wn. App. at 39.

¹⁴ 71 Wn. App. 35, 856 P.2d 706 (1993).

writing or on the record was enforceable under CR 2A.¹⁵ It concluded the agreement was enforceable because the rule did not bar enforcement of the agreement. The court reasoned that because the evidence failed to show a genuine dispute over the “purport” of the agreement, CR 2A did not bar enforcement.¹⁶

Here, the plain words of CR 2A make clear that the settlement agreement between the parties that they reached at the LR 37 conference is enforceable. As the rule requires, the agreement was reached by counsel on behalf of their respective clients. Because the settlement was reached at the LR 37 conference between counsel, the portions of the rule referring to “open court on the record” and entry “in the minutes” are inapplicable to this case. The letter of January 10, 2008, subscribed by the former counsel of NPCC, clearly sets out the terms of the offer to settle. And the unopposed declaration of counsel for Bear establishes that the offer was orally accepted during the LR 37 conference.

NPCC argues that the parties did not reach agreement because there is no clear, unequivocal writing signed by Bear or NPCC memorializing the agreement. This is partially incorrect. The letter of January 10, 2008, signed by former counsel for NPCC, sets out the express terms of the proposed settlement agreement that was orally accepted at the LR 37 conference. Moreover, there is nothing in CR 2A that requires a signature by Bear, the client. The declaration

¹⁵ Id. at 37.

¹⁶ Id. at 45.

of Bear's counsel testifying to the oral acceptance of the offer is sufficient.

NPCC also argues that the parties did not reach agreement on all material terms and that Bear's evidence falls short of proving a full agreement to settle. This too is incorrect. The material terms of the agreement were dismissal of the breach of contract and conversion claims, subject to Bear agreeing to honor the non-compete provisions of the agreement he signed. NPCC does not argue that the method of dismissal was a material term of the agreement. But even if it had made that argument, we would conclude that a fair reading of the evidence in the record defeats such a conclusion. In any event, NPCC's unsupported contentions, alone, are not sufficient to genuinely dispute the existence and terms of the agreement here.

NPCC misplaces its reliance on Eddleman v. McGhan¹⁷ and Bryant v. Palmer Coking Coal Company.¹⁸ Neither case requires the result that NPCC seeks.

In Eddleman, our supreme court held that a settlement agreement was unenforceable because *conflicting evidence was introduced on whether or not an agreement was made*, and the evidence showed that the parties had not moved from negotiation to finality.¹⁹ Similarly, in Bryant, the court refused to enforce a settlement agreement where *the parties contested* that an agreement had been

¹⁷ 45 Wn.2d 430, 275 P.2d 729 (1954).

¹⁸ 67 Wn. App. 176, 834 P.2d 662, 858 P.2d 1110 (1992).

¹⁹ Eddleman, 45 Wn.2d at 432.

reached.² In both cases, the courts reasoned, that “[w]here, as here, it is disputed that the negotiations culminated in an agreement, noncompliance with the rule and statute leaves the court with no alternative. It must disregard the conflicting evidence as they direct.”²¹

Here, unlike in those cases, there is no genuine dispute over the existence and terms of the agreement due to the lack of admissible evidence to refute that supplied by Bear. Significantly, neither Eddleman nor Bryant addresses the situation here – where the existence of the agreement is not disputed.

RCW 2.44.010

NPCC also argues that RCW 2.44.010 bars enforcement of the settlement agreement. Bear provides no written response to this argument. We hold that the statute does not bar enforcement of the settlement in this case.

RCW 2.44.010 provides:

An attorney and counselor has authority:

(1) To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding ***unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney***^[22]

² Bryant, 67 Wn. App. at 177.

²¹ Id. at 179 (quoting Eddelman, 45 Wn.2d at 432).

²² (Emphasis added.)

Neither party persuasively argues whether or not this statute should apply to this case. In State v. Pollard,²³ this court recognized that where application of a court rule would yield a different result than application of a procedural statute, the court rule supersedes the conflicting statute.²⁴ Moreover, RCW 2.04.200 instructs that where a court rule conflicts with a statute, that statute has no effect.²⁵

Here, the parties agree that to the extent there is conflict between this statute and CR 2A, the rule controls. Because we conclude that CR 2A applies to this situation and does not bar enforcement of the agreement and the facts of this case do not squarely fit within the terms of the above statute, we reject the claim that the statute prohibits enforcement of the agreement.

TRADE SECRETS CLAIM

NPCC argues that its trade secret claim was improperly dismissed on summary judgment because the trial court misinterpreted Washington's Uniform Trade Secrets Act (UTSA) chapter 19.108 RCW. We disagree.

Our review of this claim is governed by the same principles we previously stated in this opinion regarding review of grants of summary judgment.

Our fundamental objective in reading a statute is to ascertain and carry out the legislature's intent.²⁶ If a statute's meaning is plain on its face, then we

²³ 66 Wn. App. 779, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992).

²⁴ Id. at 784.

²⁵ RCW 2.04.200.

must give effect to that plain meaning.²⁷ Under the plain meaning rule, such meaning is derived from all that the legislature has said in the statute and related statutes that disclose legislative intent about the provision in question.²⁸ Strained meanings and absurd results should be avoided.²⁹ The meaning of a statute is a question of law that we review de novo.³

Neither party disputes that NPCC's materials are trade secrets. Moreover, there is no substantial dispute that the essence of the claim is that Bear deleted or overwrote information in the computer system of NPCC. NPCC concedes in its brief that it has no evidence that Bear disclosed this information to others.

Therefore, the legal question is whether Bear misappropriated NPCC's trade secrets under either sections (a) and (b) below.

Misappropriation is defined by the act in relevant part as:

(a) ***Acquisition of a trade secret*** of another ***by a person who knows . . . that the trade secret was acquired by improper means***; or

(b) Disclosure or ***use of a trade secret of another without express or implied consent by a person who***:

. . . .

²⁶ Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

²⁷ Id.

²⁸ Id. at 11-12.

²⁹ State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

³ Okeson v. City of Seattle, 150 Wn.2d 540, 548-49, 78 P.3d 1279 (2003).

(ii) *At the time of . . . use, knew or had reason to know that his or her knowledge of the trade secret was . . . (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use. . . .*^[31]

"Improper means" is defined by the statute to include "theft, bribery, misrepresentation, ***breach or inducement of a breach of a duty to maintain secrecy***"³²

A plain reading of the statute and application to the facts of this case shows there was no misappropriation of trade secrets by Bear. NPCC argues that Bear misappropriated trade secrets by "willfully deleting and overwriting proprietary data without the knowledge or authorization of NPCC."³³ NPCC contends that Bear acquired its trade secrets improperly because he accessed the data that he overwrote or deleted when others were not generally around. NPCC argues that he did not have its authorization to "use" the data in a way that destroyed it. NPCC also argues that this "use" in overwriting the data was done improperly because Bear had a duty to maintain the secrecy of NPCC's trade secrets under the act.

The ordinary meanings of the words used in the statute do not support NPCC's position. Webster's defines the word "acquired" to mean "gained by . . . effort or experience."³⁴ The word "delete" means "to wipe out" or "destroy."³⁵

³¹ RCW 19.108.010(2).

³² RCW 19.108.010(1) (emphasis added).

³³ Brief of Appellant at 23.

³⁴ Webster's Third New International Dictionary 18 (1969).

Thus, when Bear allegedly deleted NPCC's data, he destroyed trade secrets — he did not acquire them. Likewise, we disagree with NPCC that destroying data amounts to "use" of the data. As used in the act, the plain and ordinary meanings of the words "acquired" and "used" do not include the act of destruction. Moreover, we note that the act does not address the destruction of trade secrets.

Furthermore, we recognize that a purpose of the act is to maintain and promote standards of commercial ethics and fair dealing in protecting trade secrets.³⁶ Washington cases involving improper use under the act have generally addressed situations where information was used to compete or engage in unfair competition.³⁷ That is not the case here, and NPCC's argument that Bear's actions are "precisely the type that the UTSA was designed and intended to prevent" is unconvincing.

The fact that NPCC produced no evidence showing Bear used its trade secrets to engage in unfair competition provides another reason to conclude that Bear did not "use" or "acquire" trade secrets within the meaning of the act when he deleted them.

Because NPCC put forth no evidence that Bear misappropriated its trade

³⁵ Webster's Third New International Dictionary 596 (1969).

³⁶ Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 438, 971 P.2d 936 (1999).

³⁷ See, e.g., Nowogroski, 137 Wn.2d 427 (employees took employer's customer list and used it to start new venture).

secrets, there is no genuine issue of material fact on this element of the claim, and summary dismissal was proper.

MOTION TO COMPEL

NPCC argues the trial court abused its discretion by granting Bear's motion to compel discovery. We disagree.

This court reviews a trial court's ruling on a discovery motion for abuse of discretion.³⁸ A trial court abuses its discretion if its ruling is manifestly unreasonable or based on untenable grounds or reasons.³⁹

Here, NPCC repeatedly refused to turn over the electronic data it relied on in making its case against Bear. Finally, Bear moved to compel discovery. In ruling on the motion, the trial judge considered briefing and supporting declarations from both parties, oral argument, and counsel's representation that a confidentiality agreement had been executed. We note that the Order on Defendants' Motion to Compel Discovery sets forth what appear to be reasonable provisions for protection of any document deemed to be confidential.

On appeal, NPCC offers no argument why the superior court's decision was an abuse of discretion. Based on the careful consideration the judge gave the motion and the form of order entered, there is no basis to overturn the court's decision to compel discovery.

ATTORNEY FEES

³⁸ Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001).

³⁹ State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

NPCC challenges the awardability of attorney fees. Its arguments are unpersuasive.

In Washington, a party may recover attorney fees only when they are authorized by a private agreement, statute, or recognized ground of equity.⁴ The prevailing party in an action for breach of contract is entitled to attorney fees if that contract so provides.⁴¹

Here, the “Non-Disclosure and Non-Compete” agreement signed by Bear contains the following fee provision:

In the event either party enforces the Agreement by legal action, the prevailing party will be entitled to reasonable attorney fees, experts’ fees and costs, whether in pretrial, trial, arbitration or appeal^[42]

Under the plain terms of the settlement agreement, this agreement between the parties survived and was not extinguished. Moreover, there is nothing in that settlement indicating that there was any waiver of or modification to this provision. In short, the settlement agreement is silent on this point. Accordingly, it was a proper basis for the court to award fees to Bear.

For the same reason, Bear is entitled to fees on appeal. Accordingly, we award fees to Bear, subject to his compliance with the provisions of RAP 18.1

We affirm the trial court decision and award fees to Bear, subject to compliance with RAP 18.1.

⁴ Mellor v. Chamberlin, 100 Wn.2d 643, 649, 673 P.2d 610 (1983).

⁴¹ RCW 4.84.330.

⁴² Clerk’s Papers at 316.

Cox, J.

WE CONCUR:

Jan, J.

Dwyer, A.C.J.